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ONLINE RESALE RESTRICTIONS AFTER COTY: ONE YEAR ON

The message from regulators is clear – anti-competitive online resale restrictions are an enforcement priority in the EU. In [July 2018](#), for example the European Commission fined four consumer electronics manufacturers for resale price maintenance regimes imposed by producers upon their retailers. And in [December 2018](#), the Commission fined clothing company Guess for partitioning the online market through geo-blocking arrangements with its retailers. Other restrictions may have a legitimate aim, and be justifiable, provided they do not go further than necessary (the so-called ‘necessity-test’).

In 2017, the European Court of Justice (ECJ) held in *Coty* that prohibiting an authorised retailer from reselling goods through third-party platforms is permitted under competition law where it is designed to preserve the luxury image of the goods sold. Following this judgment, a series of recent national competition cases demonstrate how *Coty* is being applied, one year on. Some of these cases are reflected on below.

The Netherlands

In [October 2017](#), just prior to the ECJ’s ruling in the *Coty*-case but after publication of the Advocate General Wahl’s opinion, a Dutch civil law court ruled on the termination of a selective distribution agreement by Nike, which was challenged by its authorised Italian retailer, Action Sport. Nike had terminated the agreement because Action Sport had resold Nike products on Amazon, an unauthorised platform. The Dutch court considered the Nike products concerned (shoes, clothes and related articles) to be luxury goods and found the restriction in question not to be contrary to competition law. The Dutch court referred to the Advocate General’s opinion in *Coty* (which was followed by the ECJ), and also noted that Nike had approved other platforms as authorised resellers on which Action Sport could offer Nike products for resale, which made the proportionality of the restrictions imposed even more clear. Consequently, the Dutch court found the termination to be valid.

The Dutch court also applied *Coty* in the context of a franchise agreement in [June 2018](#). In this case, the franchisor of the weight loss formula *Size Zero* prohibited its franchisees from promoting their businesses individually on third-party platforms, while, at the same time, it pursued collective promotions with the franchisees on the same platform. Two franchisees brought a case before the Dutch court claiming damages and asking for termination of the agreement. They argued that the prohibition of individual online promotion activities on the third-party platform constituted a violation of competition law rules. Since the franchisor claimed that the formula was a luxury service and the franchisees did not contest that, the civil law judge was bound by that qualification. As for the necessity of the prohibition, the franchisor argued, (in line with *Coty*), that a prohibition on the use of a third-party platform in order to protect the luxury image was legal. Nevertheless, the Court ruled that the prohibition went further than necessary, as the franchisor allowed collective promotions on the same third party platform. The prohibition was therefore, illegal and the judge awarded the damage claim and terminated the franchise agreements.

Germany

In contrast, the highest German court for competition cases decided, in [December 2017](#), that Asics’ sports and running shoes are *not* luxury goods. That case concerned the prohibition for authorised retailers within Asics’ selective distribution system from (i) using price comparison websites, (ii) using Asics’ brand name through Google AdWords to attract customers to their own web shops, and (iii) reselling the

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products through third-party online marketplaces. Germany's competition authority, the *Bundeskartellamt*, considered that those restrictions were unlawful. On appeal, the German court considered a general prohibition on the use of price comparison websites, which is not based on quality requirements, to be an infringement of competition law. It distinguished the *Asics* case from *Coty*, by emphasising that this case concerned not only a third-party platform ban but also a combination of other restrictions, which made it practically impossible for customers to find (small) retailers online. Moreover, the German court emphasised that it considered the *Asics* goods not to be luxury; however, this consideration seems to have been of minor importance in the court's overall reasoning.

France

In [October 2018](#), France's *Autorité de la Concurrence* (AC) fined Stihl, a producer of outdoor power equipment, €7 million due to a de facto prohibition of online sales by its authorised retailers. Stihl had imposed a hand-delivery obligation on its retailers, concerning products such as brush cutters, chainsaws, electric pruners and pole-saws. This obligation meant customers were forced to pick up these products in a bricks-and-mortar shop, and retailers were prevented from selling online. In the same decision, however, the AC allowed Stihl to prohibit its authorised retailers to resell the products concerned through a third-party platform in order to preserve both the high quality and luxury image of the products. The AC held that the high quality of the products must be guaranteed by their proper use, which can be a justification for a retailer providing assistance and advice which cannot be guaranteed on third-party platforms.

United Kingdom

Finally, in August 2017, the UK's Competition and Markets Authority (CMA) imposed a fine of £1.45 million for an online re-sale prohibition by golf club producer, Ping, a finding which was subsequently upheld by the UK's Competition Appeals Tribunal in [September 2018](#) (albeit Ping's fine was reduced). Within its selective distribution system, Ping required its resellers to custom fit clubs to each customer's requirements, and insisted on face-to-face fitting both prior to and following online shopping. Authorised dealers were therefore prohibited from selling the golf clubs online. According to the CMA, the ban on internet sales was not proportionate to the objective being pursued, as other restrictions could have achieved custom fitting for customers; for example, Ping could have authorised only resellers which had an appropriate website (i) with drop-down boxes, and measurements to choose from, in order to custom fit the golf club online (as done on competitor websites), or (ii) with an interactive 'live-chat' to promote custom fitting.

Conclusion

Although there is divergence between national courts and competition authorities in the body of cases decided last year as to what may be considered a luxury good, the necessity-test has been at the centre of the analysis and provides further clarification on how *Coty* may be applied. It is clear from the *Asics* case that an online restriction must be connected to quality requirements. However, these restrictions should not go further than is necessary to achieve the legitimate aim.

EU ANTITRUST PROBE INTO AMAZON - DATA COLLECTION

The European Commission has opened a preliminary investigation into Amazon's use of data giving its dual role as platform and merchant. The Commission's [2017 E-commerce Sector Inquiry](#) already warned that: *"the exchange of competitively sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services"*.

The Commission is now examining the way Amazon is able to collect data from small businesses it hosts while also competing with them. [According](#) to Commissioner Vestager: *"The question here is about the data, because if you, as Amazon, get the data from the smaller merchants that you host — which can be, of course, completely legitimate because you can improve your service to these smaller merchants — well do you then also use this data to do your own calculations of what is the new big thing?"*

Although the investigation is still at an early stage, the Commission has already sent questionnaires to market participants and is gathering information on the issue. In particular, the Commission is investigating whether Amazon's collection of data from these retailers may give Amazon an unfair competitive advantage. The Commission is checking whether Amazon has started to sell products under its own brand that are identical or very similar to the ones merchants have offered on the company's website; whether Amazon is adapting the prices of its products based on data it obtains from other retailers; and what impact this has on retailers' businesses (i.e. whether retailers saw a drop off in sales or had to reduce prices or investment following Amazon's market entry).

In addition to the Commission, the German competition authority has initiated a parallel probe into Amazon's role, which is intended to complement the European Commission's review. The Bundeskartellamt has [stated](#) that *"Whereas the European Commission's investigations focus on Amazon's use of data to the disadvantage of marketplace sellers, the Bundeskartellamt is examining in particular the company's terms of business and practices toward sellers on its German Amazon marketplace"*.

The Austrian Competition Authority has also received a complaint from the Austria's retail association but has not yet launched a formal investigation into the issue. The [complaint](#) highlights Amazon's dual role as retailer and market place and Amazon's *"questionable business terms"*.

UK GOVERNMENT AND CMA ANNOUNCE RESEARCH INTO PERSONALISED PRICING

On 4 November 2018 the UK Department for Business, Energy and Industrial Strategy (BEIS) and the Competition and Markets Authority (CMA) [announced](#) they would conduct a joint research project into the use of personalised (or “dynamic”) pricing to target consumers. The project will focus on: (i) how widespread the practice currently is; (ii) how it is used in various media e.g. search engines and comparison tools; and (iii) to what extent personalised pricing prevents customers from getting the best deal available. The research follows widespread concern that technological developments in online sales are being used ‘unfairly’ to disadvantage consumers, and mounting pressure on competition authorities to intervene.

Personalised Pricing

Personalised pricing involves the use of personal data, such as address, birthday, marital status, and search and purchase history, to charge each consumer a price that is a function (but not necessarily equal) to their willingness to pay. Technology enables not only the gathering and analysis of this kind of personal data, but also the tailoring of online prices presented to a consumer.

Whilst it may be met with distaste by some consumers, personalised pricing online is not per se illegal under competition law. Indeed, price discrimination is widespread offline, via store loyalty cards, volume discounts and discounts for groups like students and the elderly. Although theoretically possible to consider price discrimination as an exploitative or exclusionary abuse of dominance, it is uncertain whether competition authorities would intervene in these cases as existing competition law explicitly forbids price discrimination between businesses, but not vis-à-vis businesses and final consumers. Moreover, were an effects based analysis to be applied by a competition authority investigating this conduct, there appear to be good arguments that personalised pricing is pro-competitive and can enhance consumer welfare. For example, a retailer could use personalised pricing software to assess a customers’ browsing habits and demographic, and offer them a discount they are likely to accept. This could potentially save consumers money and make it easier for them to obtain the best deal.

Beyond Pricing Algorithms

This spotlight on personalised pricing follows years of competition policy research and debate on pricing algorithms (computer programs used to determine and set prices more generally) and associated competition risks.

The use of pricing algorithms is widespread: the European Commission’s [2017 E-commerce Sector Inquiry](#) found that a majority of retailers of all sizes use pricing algorithms to track competitors’ prices (e.g. on marketplaces such as Amazon or Etsy), and two thirds use programmes to adjust their online prices as a result of market change. However, there are concerns that pricing algorithms may, for example, facilitate retail price maintenance or lead to tacit coordination among competitors through ‘hub and spoke’ arrangements, which can fall foul of competition law.

In [October 2018](#), the CMA published an in-depth paper on the use of algorithms to facilitate collusion and personalised pricing. The CMA’s main conclusions were:

- Whilst retailers can use algorithms for both tacit coordination and personalised pricing, it is unlikely both would be used at the same time. Tacit coordination relies on the transparency of retailers’ prices, whereas personalised pricing relies on a customers’ inability to detect differences in pricing.
- The risk of businesses colluding on price would likely reduce in markets which regularly use personalised pricing.

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- If personalised pricing is used more in the future, consumers would be most harmed in markets where there are few competitive constraints and consumers can be easily categorised. Additionally, if the introduction of personalised pricing came at a significant cost, consumers may be at risk of higher prices in order to negate the initial set-up costs.

Future guidance

Competition authorities across Europe are coming under increasing pressure to demonstrate that they understand, and can address effectively, the challenges of new technologies. This requires the application of their existing tool kit, but also a broader consideration of how other areas of law – including consumer protection, data protection or anti-discrimination – can be used. The research commissioned by BEIS and the CMA should provide useful insights into how authorities can respond to this challenge in relation to personal pricing and pricing algorithms.

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Online sales bans:

restriction on selling products/services online


- (EU) [Google](#)
(July 2016, ongoing investigation)
 - (EU) [Google](#)
(June 2017, Infringement decision)
- (EU) [Guess](#)
(June 2017, Opening of proceedings)
 - UPDATE: (EU) [Guess](#)
(December 2018, Press release)
- (EU) [Licensed merchandise](#)
(Opening of proceedings)
 - (EU) [Sanrio](#)
(June 2017, Opening of proceedings)
 - (EU) [Universal Studios](#)
(June 2017, Opening of proceedings)
 - (EU) [Nike](#)
(June 2017, Opening of proceedings)
- (EU) [Consumer electronics](#)
(December 2013 Inspections)
 - (EU) [Asus](#)
(February 2017, Opening of proceedings)
 - UPDATE: (EU) [Asus](#)
(July 2018, Opinion of the Advisory committee)
 - UPDATE: (EU) [Asus](#)
(July 2018, Report of the Hearing officer)
 - UPDATE: (EU) [Asus](#)
(July 2018, Press release)
 - UPDATE: (EU) [Asus](#)
(July 2018, Infringement decision)
 - UPDATE: (EU) [Asus](#)
(October 2018, Closure of proceedings)
 - (EU) [Pioneer](#)
(February 2017, Opening of proceedings)
 - UPDATE: (EU) [Pioneer](#)
(July 2018, Opinion of the advisory committee)
 - UPDATE: (EU) [Pioneer](#)
(July 2018, Report of the hearing officer)
 - UPDATE: (EU) [Pioneer](#)
(July 2018, Press release)
 - UPDATE: (EU) [Pioneer](#)
(July 2018, infringement decision)
 - UPDATE: (EU) [Pioneer](#)
(October 2018, closure of proceedings)
- (EU) [Philips](#)
(February 2017, Opening of proceedings)
 - UPDATE: (EU) [Philips](#)
(July 2018, Opinion of the advisory committee)
 - UPDATE: (EU) [Philips](#)
(July 2018, Report of the Hearing Officer)
 - UPDATE: (EU) [Philips](#)
(July 2018, Press release)
 - UPDATE: (EU) [Philips](#)
(July 2018, Infringement decision)
 - UPDATE: (EU) [Philips](#)
(October 2018, Closure of proceedings)
- (EU) [Denon & Marantz](#)
(February 2017, Opening of proceedings)
 - UPDATE: (EU) [Denon & Marantz](#)
(July 2018, Opinion of the advisory committee)
 - UPDATE: (EU) [Denon & Marantz](#)
(July 2018, Report of the hearing officer)
 - UPDATE: (EU) [Denon & Marantz](#)
(July 2018, Press release)
 - UPDATE: (EU) [Denon & Marantz](#)
(July 2018, Infringement decision)
- (F) [Bang & Olufsen](#)
(March 2014 Paris Court of Appeal judgment)
- (PL) [Roland Polska](#)
(May-June 2016, Poland Court of Appeal judgment)

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-  (UK) [Sports & entertainment merchandise](#)
(August 2016 Infringement decision)
-  (UK) [Trod / GB eye](#)
-  (UK) [Trod / GB eye](#)
(December 2016, Director disqualification)
-  (UK) [Ping Europe Limited](#)
(August 2016, Statement of objections)
-  (UK) [Ping Europe Limited](#)
(August 2017, Infringement decision)
-  (UK) [Ping Europe Limited](#)
(December 2017, Non-confidential decision)
-  (UK) [Ping Europe Limited](#)
(October 2017, Appeal)
-  (UK) [Ping Europe Limited](#)
(March 2017, Interlocutory decision)
-  UPDATE: (UK) [Ping Europe Limited](#)
(September 2018, CAT appeal judgment)

Resale price maintenance:

obligation to use fixed or minimum resale prices

-  (D) [Portable navigation devices](#)
(May 2015, Infringement decision)
-  (D) [CIBA Vision](#)
(December 2009, Infringement decision)
-  (I) [Enervit](#)
(July 2014, Commitments)
-  (UK) [Ultra Finishing](#)
(May 2016, Infringement decision)
-  (UK) [ITW](#)
(May 2016, Infringement decision)
-  (UK) [Mobility Scooters](#)
(October 2014, Infringement decision)

MFNs/Price Parity Clauses:






















guarantee to an online platform that supplier will treat the platform as favourably as the supplier's most-favoured-customer

-  (EU) [Amazon e-books](#)
(June 2015 Opening of proceedings)
-  (EU) [Amazon e-books](#)
(December 2016, Opening of proceedings)
-  EU) [Amazon e-books](#)
(January 2017, Market Test Notice Art. 27(4))
-  (EU) [Amazon e-books](#)
(January 2017, Proposed Commitments)
-  (EU) [Amazon e-books](#)
(May 2017, Commitments accepted)
-  (EU) [Amazon e-books](#)
(August 2017, Decision concerning the Trustees)
-  (EU) [E-books](#)
(July 2013 Commitments)
Hotel bookings:
-  (D) [HRS](#)
(January 2015 Düsseldorf Higher Regional Court judgment)
-  (D) [booking.com](#)
(Dec 2015 Infringement decision)
-  (F) [booking.com](#)
(Apr 2015 Commitments)
-  (F) [booking.com](#)
(October 2015, Decision Court of Appeal Paris)
-  (F) [booking.com](#)
(November 2016, Decision Business Court Paris)
-  (F) [booking.com](#)
(February 2017, Assessment of commitments made by booking.com)
-  (I) [booking.com](#)
(Apr 2015 Commitments)
-  (SE) [booking.com](#)
(Apr 2015 Commitments)
-  UPDATE: (S) [booking.com](#)
(July 2018, Stockholm Patent and Markets Court ruling)

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- (EU) [Holiday Pricing](#)
(February 2017, Opening of proceedings)
 - (EU) [REWE/DER](#)
(August 2017, Opening of proceedings)
 - (EU) [TUI](#)
(August 2017, Opening of proceedings)
 - (EU) [Thomas Cook](#)
(August 2017, Opening of proceedings)
 - (EU) [Kuoni](#)
(August 2017, Opening of proceedings)
 - (EU) [Melia](#)
(August 2017, Opening of proceedings)
 - (EU) [Report on ECN monitoring exercise in the online hotel booking sector](#)
(April 2017)
- Exclusivity clauses:**
preventing access to platforms by competitors
- (It) UPDATE: (It) [TicketOne](#)
(September 2018, Press release)
 - (EU) UPDATE: (EU): [Amadeus & Sabre](#)
(November 2018, Press release)
- Geo-blocking:**
preventing online cross-border shoppers from purchasing consumer goods or accessing digital content services
- (EU) [Pay-TV](#)
(April 2016, Commitments)
 - (EU) [Cross-border access to pay-TV](#)
(July 2017, Commitments)
 - (EU) [Cross-border access to pay-TV](#)
(July 2017, Decision concerning the Trustees)
 - (EU) [Cross-border access to pay-TV](#)
(January 2018, Opening of proceedings)
 - UPDATE: (EU) [Cross-border access to pay-TV](#)
(October 2018, Proposed commitments)
 - UPDATE: (EU) [Cross-border access to pay-TV](#)
(October 2018, Press release)
 - UPDATE: (EU) [Cross-border access to pay-TV](#)
(November 2018, Market test notice Art. 27(4))
 - (EU) [Video games](#)
(March 2016, Investigation)
 - (EU) [Capcom](#)
(February 2017, Opening of proceedings)
 - (EU) [Bandai Namco](#)
(February 2017, Opening of proceedings)
 - (EU) [Focus Home](#)
(February 2017, Opening of proceedings)
 - (EU) [Koch Media](#)
(February 2017, Opening of proceedings)
 - (EU) [Zenimax](#)
(February 2017, Opening of proceedings)
- Dual pricing:**
charging different prices for the same product/service when sold online.
- (D) [LEGO](#)
(July 2016, Commitments)
 - (D) [Gardena](#)
(November 2013, Commitments)
 - (D) [Bosch Siemens Hausgeräte](#)
(December 2013, Commitments)
 - (D) [Bathroom fittings](#)
(December 2011, Commitments)
 - (UK) [Fridge and bathroom suppliers](#)
(May 2016, Infringement decision)
- Third party platform ban:**
restriction on using third-party online market places
- (D) [Adidas](#)
(July 2015, Commitments)
 - (D) [Sennheiser](#)
(December 2013, Commitments)

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-  (D) [Asics](#)
(August 2015, Infringement decision)
 -  (D) [Asics](#)
(April 2017, Higher Regional Court of Düsseldorf)
 -  (D) [Asics](#)
(December 2017, Federal Court of Justice ruling)
 -  (D) [Deuter](#)
(December 2015, Frankfurt Higher Regional Court, appeal pending)
 -  (D) [Coty](#)
(April 2016, request for a preliminary ruling)
 -  (EU) [Coty](#)
(March 2017, Hearing)
 -  (EU) [Coty](#)
(July 2017, Opinion)
 -  (EU) [Coty](#)
(December 2017, Judgment)
 -  (F) [Caudalie](#)
(February 2016, Paris Court of Appeal judgment)
 -  (F) [Caudalie](#)
(September 2017, French Supreme Court judgment)
 -  (F) [Caudalie](#)
(March 2018, dawn raid)
 -  (F) [Adidas](#)
(November 2015, Commitments)
 -  (F) [Samsung & Amazon](#)
(November 2015, request for a preliminary ruling)
 -  (EU) [Samsung & Amazon](#)
(December 2016, preliminary ruling)
 -  (NL) [Shure Distribution Benelux](#)
(May 2016, Gelderland district court ruling)
 -  (UK) [BMW](#)
(January 2017, BMW changes policy)
 -  (UK) [L'Oréal](#)
(March 2018, High Court London)
 -  (NL) [Nike](#)
(October 2017, Amsterdam Court Judgment)
 -  (UK) [Google](#) (April 2018, Injunction)
(May 2018, Interim relief)
-  UPDATE: (NL) [Size Zero](#)
(October 2018, Amsterdam Court Judgment)
-  UPDATE: (F) [Stihl](#)
(October 2018, Infringement decision)

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